In the Supreme Court of the State of Washington

KENNETH McCLARTY, Respondent, v. TOTEM ELECTRIC, Petitioner.	))))))))))	No. 75024-6 En Banc Filed July 6, 2006

J.M. JOHNSON, J.—Totem Electric seeks review of a Court of Appeals decision reversing the summary judgment dismissal of a disparate treatment discrimination claim brought by a former employee, Kenneth McClarty (McClarty). The central issue is the definition of "disability" within the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. For the reasons stated herein, we reverse and remand for the trial court to apply the definition stated herein to the facts in this case.

Facts

McClarty had been a residential electrician for approximately 20 years when

he decided to move into industrial/commercial electrical work. In March 1998, he began a five-year apprenticeship program with the Tacoma-based Southwest Washington Electrical Joint Apprenticeship Training Program, which combined classroom instruction and on-the-job training.[1] On April 17, 1998, McClarty's union, Local 76 of the International Brotherhood of Electrical Workers, dispatched him to Totem Electric, the electrical subcontractor on the Old Tumwater High School renovation project. He worked there until his termination three months later. McClarty performed various duties, including using a jackhammer and shovel to level trenches dug by a backhoe, installing plastic pipe through which wires were pulled, organizing material in on-site trailers, and doing rough-in work for the school's classrooms. From July 7 until July 31, McClarty worked at leveling trenches and laying plastic pipe.

McClarty testified that he told his foreman that he was experiencing pain in his hands and asked for a break from digging. Totem Electric asserts that McClarty mentioned this problem for the first time on July 28, when he reported that his hands hurt from the digging and they fell asleep at night. Totem Electric told him to consult a doctor.

[1] The apprenticeship program is run by the union and employers.

On July 30, 1998, Samuel E. Coors, D.O., diagnosed McClarty with bilateral carpal tunnel and specified work restrictions for an estimated six-month period. The restrictions required that "[r]epeated push/pull," "[r]epeated simple grasp," and "[r]epeated fine manipulation"—were not to exceed 33 percent of an eight-hour workday. Clerk's Papers (CP) at 56. The following day McClarty gave Totem Electric the "Doctor's Release for Work." That same day, Totem Electric gave McClarty a written termination notice identifying the reason for the termination as a "Reduction in work forces/lay-off." CP at 57.

McClarty testified that the project foreman, Rick Sare, told him that the carpal tunnel diagnosis was the basis for the layoff. Sare testified that the remaining work on the project required the restricted hand and wrist movements and that, in any case, McClarty's work performance had been poor. The week following McClarty's termination, Totem Electric hired two apprentices dispatched by the same union, at lower rank and pay.

McClarty had received a work evaluation from that program dated July 22, 1998, rating his overall "knowledge of the trade and performance on the job" as "Below Average." CP at 122. Two additional evaluations from the program, dated August 25, 1998, assigned overall ratings of "Below Average" and the lowest possible rating, "Unsatisfactory." CP at 120, 121. McClarty was also terminated

from the joint apprenticeship program by letter dated September 23, 1998.

McClarty, acting pro se, filed a complaint in July 2001 in Thurston County Superior Court against Totem Electric and against his union, Local 76, alleging unfair employment practices in violation of RCW 49.60.180 and .190, retaliatory practices in violation of RCW 51.48.025, wrongful termination, and breach of contract. Local 76 removed the matter to the United States District Court for the Western District of Washington, which dismissed all of McClarty's claims against Local 76 in December 2001 and remanded the remaining state claims to superior court.[2]

In January 2002, the trial court denied McClarty's motion for partial summary judgment on the issue of Totem Electric's employment discrimination. Totem Electric moved for summary judgment in August 2002, seeking dismissal of the three remaining claims—disability discrimination under RCW 49.60.180, retaliatory discharge under RCW 51.48.025, and wrongful termination. McClarty conceded that the retaliation claim should be dismissed but contested the summary judgment. In October 2002, the trial court granted Totem Electric's motion, dismissing McClarty's complaint in its entirety and awarding Totem Electric its costs and

[2] Before the state court action, Local 76 moved for correction of the caption and was removed as a party defendant.

statutory fees.

The Court of Appeals affirmed the grant of summary judgment on McClarty's accommodation claim, but reversed the grant of summary judgment on his disparate treatment claim and remanded the case for further proceedings, deferring the issue of attorney fees until the ultimate prevailing party could be determined by the trial court on the merits. *McClarty v. Totem Elec.*, 119 Wn. App. 453, 473, 81 P.3d 901 (2003).

We granted Totem Electric's petition for review "only as to the issue regarding the definition of disability in disparate treatment claims" and "the issue presented by [McClarty] regarding attorney fees." Wash. State Supreme Court Order, *McClarty v. Totem Elec.*, No. 75024-6, 152 Wn.2d 1011 (Sept. 10, 2004). We denied McClarty's cross-petition for review of the dismissal of his accommodation claim.[3]

Issues

(1) In disability discrimination suits brought under the WLAD, what is the

[3] The dismissal was based on McClarty's inability to satisfy the second prong of the *Pulcino* definition—proof that his carpal tunnel syndrome "had a substantially limiting effect upon [his] ability to perform his . . . job." *Pulcino v. Fed. Express Corp.,* 141 Wn.2d 629, 641, 9 P.3d 787 (2000). As the Court of Appeals observed, McClarty testified in his deposition that the medical restriction applied only to jackhammering and shoveling more than a third of the day, that no such work remained to be performed, and that he could do "anything" required. *McClarty*, 119 Wn. App. at 468 (quoting CP at 96).

appropriate definition of "disability" to be applied?

(2) Did the Court of Appeals properly conclude that under the WLAD any award of attorney fees on appeal must be deferred until the prevailing party has been determined by the trial court on the merits?

Analysis

To provide for a single definition of "disability" that can be applied consistently throughout the WLAD, we adopt the definition of disability as set forth in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12209. We hold that a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment.

A. Standard of Review

"When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787(2000). Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d

434, 437, 656 P.2d 1030 (1982). "All questions of law are reviewed de novo." *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

B. Unlawful Termination: Disparate Treatment Claim

In Washington, an employer generally has the common law right to terminate an employee "for no cause, good cause or even cause morally wrong without fear of liability." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). The WLAD represents a statutory exception to this rule barring race, sex, disability, and other enumerated characteristics from providing a basis for hiring or discharge.[4]

As applicable here, the WLAD forbids an employer from discharging an employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2). The WLAD also forbids an employer from discriminating against an employee in compensation or in other terms or conditions of employment because of any sensory, mental, or physical disability. RCW 49.60.180(3). RCW 49.60.180(1) prohibits refusing to hire on the same grounds.

The legislature first enacted the WLAD in 1949 to eliminate racial discrimination in employment. *See* Laws of 1949, ch. 183; Rem. Rev. Stat. § 7614

[4] Under WLAD, RCW 49.60.030, .175, .176, .178, .180, .190, .200, .215, .222 and .225 prohibit discrimination against the disabled. The statutes cover employment, insurance, facility access, etc.

(Supp. 1949). The statute was extended to prohibit discrimination against "handicapped" persons in 1973. *See* Laws of 1973, 1st ex. sess., ch. 214.

The Federal Rehabilitation Act of 1973 (29 U.S.C. § 701), a precursor to the federal ADA, was passed in the same year. When the federal ADA was adopted in 1990, it used the term "disability" instead of "handicapped." We have concluded that the use of the term "disability" has evolved to the point that its definition in the federal statute and in Washington's should be the same.

In 1993, the legislature amended the WLAD, replacing all uses of the term "handicap" with the term "disability." *See* Laws of 1993, ch. 510. In our jurisprudence the terms "handicap" and "disability" are interchangeable. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 191 n.17, 23 P.3d 440 (2001).

The WLAD makes it unlawful for an employer, "[t]o expel from membership any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . ." RCW 49.60.190(2). These provisions give rise to disability discrimination claims under two theories – disparate treatment and failure to accommodate. "'An employer who discharges, reassigns, or harasses for a discriminatory reason faces a disparate treatment claim; an employer who fails to accommodate the employee's disability, faces an accommodation claim.'" *Pulcino*, 141 Wn.2d at 640 (quoting *Hill v. BCTI*

Income Fund-I, 97 Wn. App. 657, 667, 986 P.2d 137 (1999).

Of central importance here, the legislature has never found it necessary to define the terms "handicap" or "disability" within the WLAD.[5] Unfortunately, and with confusing result, applications of the same term "disability" have led to different definitions, depending on type of claim. We shall attempt to reconcile these differences.

In 1975, however, the Washington State Human Rights Commission (HRC) did adopt a regulation to define "handicap," which it later amended several times. As amended, the regulation provides that:

> (1) "Disability" is short for the statutory term "the presence of any sensory, mental, or physical disability," except when it appears as part of the full term.
>
> (2) "The presence of a sensory, mental, or physical disability" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
>
> (a) Is medically cognizable or diagnosable;
>
> (b) Exists as a record or history;
>
> (c) Is perceived to exist whether or not it exists in fact.
>
> A condition is a "sensory, mental, or physical disability" if it is an abnormality *and is a reason why the person having the condition did not get or keep the job in question*, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by

[5] Conversely, the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12209) (ADA), one of the WLAD's federal counterparts, explicitly defines "disability."

> the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she *is discriminated against because of the condition* and the condition is abnormal.

WAC 162-22-020 (emphasis added) (codifying as amended HRC Order 23, § 162-22-020 (filed July 21, 1975)). This WAC was flawed (as well as unduly complicated).

Just one year later, this court did not utilize this HRC definition of "handicap" in deciding a vagueness challenge to RCW 49.60.180.[6] *See Chic., Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 805-06, 557 P.2d 307 (1976). This court relied on the plain and ordinary meaning of the term "handicap" as set forth in the dictionary. "A disadvantage that makes achievement unusually difficult; *esp* : a physical disability that limits the capacity to work." Webster's Third New International Dictionary 1026 (1961).

Nearly 20 years later, we again expressly acknowledged that the HRC regulation was problematic. *Doe v. Boeing Co.*, 121 Wn.2d 8, 15, 846 P.2d 531 (1993). We specifically noted that the regulation was circular: it required a factual finding that the plaintiff was discriminated against "*because of the condition* in

[6] While WAC 162-22-020 was adopted July 21, 1975, this court's decision in *Chicago* was not published until over one year later, thus this court had the opportunity to use the definition but did not.

order to determine whether the condition is a 'handicap.'" *Id*.

In *Pulcino,* seven years later, we concluded that the circularity of WAC 162-22-020 rendered it unworkable in the context of accommodation cases. We reasoned that

> [t]he employee would . . . have to prove that the employer failed to accommodate the employee (i.e., discriminated against him or her) *because of* the employee's abnormal condition. This implies that the employer accommodates other employees; but, obviously, employees who are not disabled do not require such accommodation.

Pulcino, 141 Wn.2d at 641.

Accordingly, *Pulcino* defined "disability" to require a claimant to prove that (1) he or she has or had a sensory, mental, or physical abnormality, and (2) the abnormality has or had a substantially limiting effect on his or her ability to perform the job. *Id.* We further provided that "[a]n employee can show that he has a sensory, mental or physical abnormality, by showing that he or she has a condition that is medically cognizable or diagnosable, or exists as a record or history." *Id.*

A year later in *Hill*, we reinforced our reasoning in *Pulcino*, observing that the circularity of WAC 162-22-020

> makes it impossible for plaintiffs to satisfy their first *intermediate* evidentiary burden without simultaneously producing evidence in support of their *ultimate* allegation, namely, that the adverse action occurred *because of* that alleged "disability."

Hill, 144 Wn.2d at 192 n.19. While acknowledging that the case did not require us to decide whether *Pulcino* should be applied to all disability discrimination cases, we noted that we were "greatly troubled" by WAC 162-22-020, seeing "no principled reason why it should be fundamentally harder to establish prima facie cases of disability discrimination under RCW 49.60.180 than prima facie cases of any other form of discrimination made unlawful by [the WLAD]." *Hill*, 144 Wn.2d at 192 n.19.[7] It appears that we would have applied a single definition to both claims had Hill properly preserved her disparate treatment claim. *Id*. at 193 n.20.

The most obvious problem with WAC 162-22-020 is that its definition of "disability" is at odds with the plain meaning of the term. Where, as here, a statute fails to define a term, rules of statutory construction require us to give the term its plain and ordinary meaning, which we derive from a standard dictionary if possible. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 28, 100 P.3d 814 (2004). *See also One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) (stating that we should also keep in

[7] For example, "a prima facie case of racial discrimination," for instance, is generally established "by showing (i) that [the plaintiff] belongs to a racial minority; (ii) that he [or she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his [or her] qualifications, he [or she] was rejected; and (iv) that, after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

mind the context of the statute as a whole and the intent of the legislature).

Bearing this in mind, we earlier relied on the plain meaning of the term "handicap" in rejecting a vagueness challenge to RCW 49.60.180:

> Men of common intelligence need not guess at the meaning of "handicap" because it has a well defined usage measured by common practice and understanding. "Handicap" commonly connotes a condition that prevents normal functioning in some way. A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental, or physical faculties. A "handicap" is: " . . . *a disadvantage that makes achievement unusually difficult; esp: a physical disability that limits the capacity to work*." *Webster's Third New International Dictionary* (1961). It is obvious that "handicap" has a well understood, common meaning. Men of ordinary intelligence undoubtedly can understand what constitutes a "handicap" within the context of RCW 49.60.180(1) . . . .

Chi., Milwaukee, St. Paul & Pac. R.R. Co., 87 Wn.2d at 805-06 (citations omitted) (emphasis added).

The 1993 substitution of "disability" for "handicap" in the WLAD did not change this common sense conclusion. "Disability" means the "inability to do something." Webster's Third New International Dictionary of the English Language 642 (2002). Specifically, it includes "a physical or mental illness, injury, or condition that incapacitates in any way." *Id*. Given this definition, a disability discrimination claimant should be required "to show that his condition substantially

limited his ability to perform" *something* before he is deemed disabled under the WLAD. *McClarty*, 119 Wn. App. at 470. The United States Supreme Court has come to the same conclusion.

That the regulation definition of "disability" contravenes the purpose of the WLAD was not the only problem. WAC 162-22-020 also conflicts with much of our antidiscrimination jurisprudence because the regulation would require a disability discrimination plaintiff to prove that he has been discriminated against because of his condition to prove that he is "disabled" in the first place. As acknowledged in the Court of Appeals decision below, this requirement destroys the *McDonnell Douglas* burden-shifting scheme because it forces a plaintiff to prove the ultimate fact of discrimination simply to make a prima facie case. *McClarty*, 119 Wn. App. at 467. *See also Hill*, 144 Wn.2d at 192 n.19.

This burden violates the legislature's command that the provisions of the WLAD be liberally construed, RCW 49.60.020, and is inconsistent with the burdens placed upon plaintiffs in other types of discrimination cases. *See, e.g., Hill*, 144 Wn.2d at 181 (noting that a prima facie case of racial discrimination requires plaintiff to show simply, inter alia, "that [the plaintiff] belongs to a racial minority.").

This analysis requires us to discard the regulation definition, as we did in

Pulcino and *Hill*. *Cf. In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005); *Griffin v. Eller*, 130 Wn.2d 58, 69-70, 922 P.2d 788 (1996).

Previous definition efforts have also failed because they result in defining "disability" to include *any* medically cognizable abnormality. Such a definition is far broader than the plain and ordinary meaning of the term "disability" and cannot be supported by the text of the statute or the history underlying it.

The WLAD speaks in terms of "disability," not of "medical condition." *Cf.* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Emp. & Lab. L. 91, 101-02 (2000).[8] Furthermore, "'[i]t is doubtful that any legislature intended, or even envisioned, that its handicapped discrimination laws would be interpreted to address the problems associated with a sprained finger or ankle.'" *Pulcino*, 141 Wn.2d at 661-62 (Madsen, J., dissenting) (quoting 3A Arthur Larson & Lex K. Larson, Employment Discrimination § 107.32(c), at 22-131 (1991)).[9]

[8] Feldblum, a leading disability-rights advocate, observes that the federal Rehabilitation Act of 1973 prohibited discrimination based on "handicap" and not on the basis of physical or mental impairment. She notes that disability-rights advocates were primarily concerned with extending civil rights protections to severely impaired individuals who were the traditional targets of discrimination. *See* Feldblum, 21 Berkeley J. Emp. & Lab. L. at 102. The same considerations apply here, given that our legislature extended the WLAD's protections to handicapped persons during the same year that the Rehabilitation Act was enacted by Congress.

[9] In her dissent in *Pulcino*, Justice Madsen persuasively demonstrates the truth of this statement through an exhaustive examination of other states' disability discrimination laws. *See Pulcino*, 141 Wn.2d at 654-60 (Madsen, J. dissenting); *cf.* Wendy E. Parmet, *Plain Meaning and*

Illustrating this point, counsel for amicus Washington Employment Lawyers' Association (WELA) conceded at argument that, under the definition in WAC 162-22-020, a *receding hairline* could constitute a disability. *See* Wash. State Supreme Court oral argument at 55:30, *McClarty v. Totem Elec.,* No. 75024-6 (Jan. 19, 2005), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. Such an extension "trivializes the discrimination suffered by persons with disabilities." *Pulcino*, 141 Wn.2d at 652 (Madsen, J., dissenting).

The *Pulcino* definition also had difficulties. As McClarty and WELA argue, some obviously disabled, e.g. the blind or the paraplegic, may not be considered disabled under a strict reading of the *Pulcino* definition. They suggest, for example, that a paraplegic applying for a position that did not require mobility might not be considered disabled under *Pulcino* because the medical condition would not have a substantially limiting effect on his ability to perform *that* job. In addition, beyond defining "disability," *Pulcino* may confusingly conflate the concept of disability with elements of a failure to accommodate claim. As a result, it is difficult to apply the *Pulcino* definition outside the accommodation context.

Mitigating Measures: Judicial Interpretations of the Meaning of Disability, 21 Berkeley J. Emp. & Lab. L. 53, 64 (2000) (noting that, in enacting the ADA, Congress "did not intend that *every* conceivable condition would constitute a disability.").

It is true that a court will often give weight to a statute's interpretation by the agency which is charged with its administration. *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). However, this court has the ultimate authority to construe statutes, *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994), and statutes must be given a rational and sensible interpretation, *State v. Thomas*, 121 Wn.2d 504, 512, 851 P.2d 673 (1993). WAC 166-22-020(2) is not a rational and sensible interpretation of the term "disability" as it is used in the WLAD, and we reject it in favor of a definition better supported by the WLAD's text, the legislature's intent and our jurisprudence.

To provide a single definition of "disability" that can be applied consistently throughout the WLAD, we adopt the definition of disability set forth in the federal ADA. We hold that a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment.

This court has held that federal law is instructive with regard to our state discrimination laws. *Dedman v. Pers. Appeals Bd.*, 98 Wn. App. 471, 478, 989 P.2d 1214 (1999). *See also Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986); *Dean v. Mun. of Metro. Seattle*, 104 Wn.2d 627,

638, 708 P.2d 393 (1985). Additionally, this court has previously used definitions given by the Equal Employment Opportunity Commission to define the ADA when deciding questions of Washington discrimination law. *See Davis v. Microsoft Corp.,* 149 Wn.2d 521, 70 P.3d 126 (2003). *See also Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 914 P.2d 67 (1996); *Dedman,* 98 Wn. App. 471.

A physical or mental impairment that is substantially limiting impairs a person's ability to perform tasks that are central to a person's everyday activities, thus are "major life activities." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002). The United States Supreme Court has held that substantially limited means "'[u]nable to perform a major life activity that the average person in the general population can perform'" *id.* at 195 (quoting 29 C.F.R. § 1630.2(j) (2001)) and defined major life activities as "those activities that are of central importance to daily life." *Id.* at 197.

Several considerations support the definition we give here. First, and most importantly, it is consistent with the plain meaning of the term "disability" as utilized by the legislature and the history underlying the WLAD. Second, it accords closely with the definition of the same term "disability" in the federal ADA. This is appropriate, given that the original federal and Washington laws against disability discrimination were enacted nearly contemporaneously and directed at the same

issue. *See also Clarke*, 106 Wn.2d at 118 ("when Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to determine the appropriate construction.").[10, 11] Finally, the proposed definition would ensure that scarce judicial resources are available to those most in need of the WLAD's protections, rather than persons with receding hairlines. This definition should avoid "trivializ[ing] the discrimination suffered by persons with disabilities." *Pulcino*, 141 Wn.2d at 652 (Madsen, J., dissenting).

We remand to the trial court to apply this definition to McClarty's disparate treatment claim.

C. Attorney Fees

Reasonable attorney fees may be awarded on appeal if applicable law grants a party the right to recover such fees or expenses on review before either the Court

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[10] Moreover, as a practical matter, there is an abundance of authority interpreting the ADA that, while not binding upon our disposition of state law claims, *see Hill*, 144 Wn.2d at 180, they could assist us in construing and applying similar provisions in the WLAD. *See, e.g., Toyota Motor Mfg.*, 534 U.S. 184; 29 C.F.R. § 1630.2(j)(2) (listing factors to consider in determining whether individual is "substantially limited").

[11] The dissents suggest this opinion may be viewed as legislating from the bench. This criticism misses the mark. First, this court's decisions in *Pulcino v. Federal Express Corp.* and *Hill v. BCTI* had both recognized that the same WAC definition was circular and could not be effectively applied as written. Second, our legislature did not define disability—the definition under review is an administrative agency regulation. We are following our legislature's intent in applying the plain and ordinary understanding, which is assumed when the legislature does not further define a term.

of Appeals or the Supreme Court. RAP 18.1(a). The WLAD allows a plaintiff in a discrimination action to recover "the cost of suit including reasonable attorneys' fees." RCW 49.60.030(2).

Although McClarty sought attorney fees on appeal, he now correctly concedes that courts have declined to award fees under the WLAD until the plaintiff prevails.[12] McClarty also raises the issue of his entitlement to costs on appeal. "A commissioner or clerk of the appellate court will award costs to the party that *substantially prevails* on review, unless the appellate court directs otherwise . . . ." RAP 14.2 (emphasis added.) Costs include statutory attorney fees and reasonable expenses that are specifically enumerated in RAP 14.3.

McClarty argues that he substantially prevailed on appeal because he obtained a reversal of the trial court's summary dismissal of his disparate treatment

[12] Although RCW 49.60.030(2) does not expressly provide for attorney fees on review, Washington courts have interpreted the statute to authorize such awards. *See, e.g., Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 533, 844 P.2d 389 (1993) (citing *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991); *Minger v. Reinhard Distrib. Co.*, 87 Wn. App. 941, 948, 943 P.2d 400 (1997)). The correct answer, however, is that an employee who brings a claim under the WLAD is entitled to attorney fees only if his or her claim is meritorious: "Entitlement to attorney fees cannot be determined until after trial on the merits." *Hinman v. Yakima Sch. Dist. No. 7*, 69 Wn. App. 445, 453, 850 P.2d 536 (1993). "Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 153, 94 P.3d 930 (2004). Here, the Court of Appeals correctly deferred any award of reasonable attorney fees because McClarty's disparate treatment claim under the WLAD has not yet been decided on the merits. *McClarty*, 119 Wn. App. at 473.

claim. Totem Electric contends that it prevailed because the dismissal of McClarty's failure to accommodate claim was affirmed on appeal.

McClarty and Totem Electric have each prevailed on some issues. Under such circumstances, neither party has substantially prevailed, and the parties must bear their own costs. *See Nw. Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 985-86, 640 P.2d 710 (1981). The trial court may also consider fees after disposing of the case on remand.

Conclusion

Where the legislature employs a term of common usage and chooses to define the term no further, it is the duty of this court to give effect to that meaning. Here, we have restated our legislature's understanding of these common terms in a manner consistent with comparable federal protections for those, and only those, included within these protections. This should leave this important area of law clearer in providing appropriate protection for those truly disabled.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Barbara A. Madsen

Justice Richard B. Sanders

Justice Bobbe J. Bridge